

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST )	
FOR REVIEW BY: )	CHARGE NO.: 2009CF2496
)	EEOC NO.: 21BA91164
<b>ADOLFO MOLINA</b> )	ALS NO.: 10-0045
)	
)	
Petitioner. )	

**ORDER**

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon Adolfo Molina's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")<sup>[1]</sup> of Charge No. 2009CF2496; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, WHEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following ground:

**LACK OF SUBSTANTIAL EVIDENCE**

In support of which determination the Commission states the following findings of fact and reasons:

1. On February 11, 2009, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged that on December 30, 2008, Oldcastle Glass Inc. ("Employer") discharged him from his position of Loader/Unloader because of his physical disability, vertigo, in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act"). On December 22, 2009, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence. On January 22, 2010, the Petitioner filed this timely Request.
2. At the time of the events alleged in charge, the Employer had in place a progressive discipline policy for those who violated its "No Fault Absenteeism and Tardiness Policy." According to the discipline policy, four violations within a 12 month period would result in a written warning; five violations would result in a final written warning; and six violations would result in discipline up to and including termination.
3. In addition, the Employer had in place a Family Medical Leave Act ("FMLA") Policy which provided employees with 12 weeks of unpaid leave of absence. Pursuant to the FMLA Policy, FMLA leave runs concurrently with any accrued benefit time, such as vacation days.

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<sup>[1]</sup> In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."

4. The Petitioner took a leave of absence pursuant to the FMLA Policy from December 11, 2007, through March 4, 2008. The Petitioner exhausted all of his vacation days during this time period.
5. The Petitioner left work early on April 8, 2008, April 14, 2008, April 18, 2008, and on May 1, 2008.
6. On April 22, 2008, the Petitioner arrived to work late.
7. On May 16, and May 19, 2008, the Petitioner was absent from work.
8. On June 9, 2008, the Petitioner was marked by the Employer as being a “no call/no show.”
9. The Petitioner alleged in his charge that on December 30, 2008, the Employer discharged him because of his disability. The Employer argued that it discharged the Petitioner for excessive absenteeism.
10. In his Request, the Petitioner argues that he believes his termination was motivated by discrimination because shortly after the Employer terminated the Petitioner, an employee who had also been terminated by the Employer for absenteeism was rehired. Additionally, the Petitioner argues that, pursuant to his union contract, he was not required to use vacation days as sick days. Therefore, he should not have been required to exhaust his vacation days during his FMLA leave.
11. In its Response, the Respondent requests that the Commission sustain the dismissal of the Petitioner’s charge for Lack of Substantial Evidence.

## **Conclusion**

The Commission concludes the Respondent properly dismissed the Petitioner’s charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent’s investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, \*2 (March 7, 1995).

The Commission concludes that the Petitioner failed to establish a *prima facie* case of discrimination. Generally, in order to establish a *prima facie* case of discrimination, the Petitioner must show: (1) that he falls within a protected class; (2) that he was performing his job satisfactorily; (3) that he was subjected to an adverse action; and (4) that the Employer treated similarly situated employees outside of the Petitioner’s protected class more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2<sup>nd</sup> Dist. 1994).

In this case, the Petitioner failed to establish the fourth element of his *prima facie* case because the Employer presented evidence that it had discharged similarly situated, non-disabled employees for excessive absenteeism. As such, the Petitioner cannot show that the Employer treated

similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show the Respondent's dismissal of his charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

**WHEREFORE, IT IS HEREBY ORDERED THAT:**

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Oldcastle Glass Inc., as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

<b>STATE OF ILLINOIS</b>	)	
	)	
<b>HUMAN RIGHTS COMMISSION</b>	)	<b>Entered this 25th day of August 2010.</b>

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini